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IN THE
COURT OF APPEALS OF INDIANA

BART LEROY KIMMEL,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 76A03-0612-CR-596
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE STEUBEN CIRCUIT COURT
The Honorable Allen N. Wheat, Judge
Cause No. 76C01-0602-FB-133

August 20, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Bart Kimmel appeals his sentence following his conviction for Dealing in a Substance Represented to be a Controlled Substance, a Class D felony, pursuant to a guilty plea. He presents two issues for our review:

1. Whether the trial court abused its discretion when it imposed an enhanced sentence.

2. Whether the trial court's identification of his criminal history as an aggravator violates Apprendi v. New Jersey, 530 U.S. 466 (2000).

We affirm.

FACTS AND PROCEDURAL HISTORY

On January 21, 2005, Kimmel represented that he sold methamphetamine to a confidential informant, but the substance was later determined to be rock salt. The State charged him with dealing in a substance represented to be a controlled substance and being an habitual offender. In June 2006, Kimmel entered into a plea agreement whereby he pleaded guilty to the dealing charge. In exchange for his plea, the State dismissed the following: the habitual offender charge; a charge for Failure to Return to Lawful Detention, a Class D felony, under another cause number; and the revocation of his probation in yet another cause number. At sentencing, the trial court identified a single aggravator, namely Kimmel's criminal history, and two mitigators, namely, the hardship on his family and his guilty plea. The trial court found that the aggravator outweighed the mitigators and imposed the maximum sentence of three years. This appeal ensued.

DISCUSSION AND DECISION

Issue One: Sentence

Kimmel first contends that the trial court abused its discretion when it imposed an enhanced sentence.[1] Sentencing decisions lie within the sound discretion of the trial court and are reviewed only for an abuse of that discretion. Powell v. State, 751 N.E.2d 311, 314 (Ind. Ct. App. 2001). If the sentence imposed is authorized by statute, we will not revise or set aside the sentence unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B); McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001).

Under the prior sentencing scheme,[2] the presumptive sentence for a Class D felony was one and one-half years, and the trial court was permitted to add up to one and one-half years for aggravating circumstances. Ind. Code § 35-50-2-7 (West 2005). Here, the trial court identified a single aggravator, namely, Kimmel's "[e]xtensive juvenile and adult criminal history all as set forth in [the] PSI incorporated herein." Appellant's App. at 48-49. And the trial court identified two mitigators, namely, the hardship on Kimmels' family and his guilty plea. The trial court found that the aggravator outweighed the mitigators and imposed the maximum sentence of three years.

Kimmel first contends that the trial court gave too much weight to his criminal history. He characterizes his criminal history as "minor" and his prior crimes as

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[1] Kimmel characterizes this issue as a challenge under Indiana Appellate Rule 7(B), but his argument is framed as a challenge to the trial court's discretion to impose sentence. Accordingly, we do not engage in a separate analysis under Rule 7(B).

[2] Kimmel's offense in this case occurred before the new advisory sentencing scheme was enacted. Thus, the prohibition against reviewing a trial court's weighing of aggravators and mitigators set out in Anglemyer v. State, 868 N.E.2d 482, 491 (Ind. 2007), does not apply.

"unrelated to the present crime." Brief of Appellant at 7. As such, Kimmel maintains that his criminal history cannot outweigh the two mitigators to support an enhanced sentence. But the State argues that the trial court properly recognized both the length of Kimmel's criminal history and its gravity.

Our review of the PSI shows that over the course of twenty-four years, Kimmel accrued three prior felony convictions, seven misdemeanor convictions, and two juvenile adjudications. One of Kimmel's prior convictions was for possession of a controlled substance, as a Class D felony, in 2002. Further, Kimmel was found to have violated the terms of his probation on three occasions, and he also violated the terms of a community corrections program. We conclude that the trial court did not abuse its discretion when it gave Kimmel's criminal history substantial weight.

Still, Kimmel contends that the mitigators outweigh his criminal history and justify the imposition of the presumptive sentence. In particular, he maintains that his guilty plea deserves more mitigating weight because he did not significantly benefit from the plea. A finding of mitigating circumstances lies within the trial court's discretion. Widener v. State, 659 N.E.2d 529, 533 (Ind. 1995). The trial court is not obligated to explain why it did not find a factor to be significantly mitigating. Chambliss v. State, 746 N.E.2d 73, 78 (Ind. 2001). And the sentencing court is not required to place the same value on a mitigating circumstance as does the defendant. Beason v. State, 690 N.E.2d 277, 283-84 (Ind. 1998).

Kimmel asserts that while the State dismissed the habitual offender count, there was no statutory basis for that charge and the State would have had to dismiss it,

regardless. But Kimmel ignores the benefit he received when the State dismissed a D felony charge in another cause and a probation revocation proceeding in exchange for his plea in the instant case. Not every guilty plea must be credited as a mitigating circumstance. Wilkie v. State, 813 N.E.2d 794, 799 (Ind. Ct. App. 2004), trans. denied. Here, the trial court did find Kimmel's guilty plea mitigating, but gave it "little weight." Appellant's App. at 49. We cannot say that the trial court abused its discretion on this issue.

Kimmel also contends that the trial court did not give enough mitigating weight to his show of remorse. But it is well settled that even where a defendant shows remorse, the trial court is not required to find that he is sufficiently remorseful to warrant mitigating the sentence. See Chambliss, 746 N.E.2d at 79. Kimmel stated, "I'm sorry for what I've done." Transcript at 35. And he went on to explain that he had been "clean and sober" for "over a year." Id. But the trial court was justified in rejecting that proffered mitigator, especially considering that Kimmel's effort to "get clean" coincided with his arrest in the instant case.

In sum, Kimmel has admitted to habitual substance abuse until the time he committed the instant offense. He has never consistently held a job despite having fathered eight children. And Kimmel's criminal history is significant, despite his argument to the contrary. We cannot say that the trial court abused its discretion when it found that the criminal history aggravator outweighed the mitigators in this case. Further, to the extent that Kimmel alleges that his sentence is inappropriate in light of the nature of the offense and his character, we cannot agree.

Issue Two: Apprendi

Kimmel next contends "[t]hat a substantial question yet remains about whether the fact of prior conviction is an element of an offense or its functional equivalent for Sixth Amendment purposes[.]" Reply Brief at 12. In essence, Kimmel asks that we disregard the United States Supreme Court's holding in Apprendi v. New Jersey, 530 U.S. 466 (2000). We decline Kimmel's invitation and hold that the trial court properly considered his criminal history as an aggravator at sentencing.

Affirmed.

MATHIAS, J., and BRADFORD, J., concur.